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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-611

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHIM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents and Cross-Petitioners,

and

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL and LEON KARCHMER,

Respondents.

CROSS-PETITIONERS' REPLIES TO BRIEFS IN OPPOSITION

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Preliminary Statement

It is significant that, although the judgment attacked by Mr. Freedman is in favor of the NMU Officers' Pension Trust, none of the defendants, either trustee or union officer, has said one word in opposition to the Freedman petition for a writ. (See plaintiffs' brief in opposition (No. 73-478), pp. 1-2).

Reply to the Defendants Curran and Wall

I

With respect to the payment to Perry:

We do not challenge the facts found by the District Court. The District Court found that Curran "dominated the people who had anything to do with the payment from the Officers' Pension Plan to Perry."

What we do challenge is the failure to charge Curran with this payment, as a matter of law. His domination over the trustees made him responsible for their act in making this improper payment to his good and close friend when he had been warned that the payment would be improper and knew in advance that the payment would be made.

The argument that union officers are entitled to rely on "the opinion of the Union's general counsel" (Curran and Wall brief, pp. 2 and 8) is ill-founded. Curran did not seek advice of counsel on the payment to Perry (our petition, p. 13). In fact, the union's general counsel, Freedman himself, states (Freedman petition, p. 26):

> "Mr. Freedman's only advice was given to the trustees."

But in this situation, it would be surprising indeed if a union official could claim protection from § 501 liability on the basis of any such opportune advice—even had such advice been sought.

II

With respect to the Shapiro trust:

(a) The finding by the Court of Appeals that the money had not been paid to Shapiro is contrary to the NMU financial statement and contrary to Treasurer Wall's testimony (our petition, pp. 20-21).

(b) The Shapiro trust was for the benefit of persons to be selected by Curran. Curran testified that he intended to use the fund to protect those removed by the decree entered in this action (610a). There never was a pension plan so indefinite and uncertain. The Plan (if the document can be so designated) does not designate the class or type of employee beneficiary. It does not require any particular length of service. It does not set forth any guidelines as to how pensions will be computed and how paid. It is a blank check.

The Court of Appeals, in making the finding that the money had never been paid out, relied upon a letter from Mr. Epstein. This letter* was written after the trial had been completed and should not have been allowed to override the testimony of Mr. Wall that the money had been paid.

But even if taken as proof in the case, the letter opened as many questions as it attempted to close; viz, What did Mr. Epstein mean when he said that the $460,363 had been transferred to an interest bearing account "under the control of the Union"? Did he mean that it was under the control of Joseph Curran? Where and by whose authority was the deposit made? In whose name was the deposit made?

Curran and Wall refer to a memorandum which is said to have been read at an alleged May, 1972 meeting "describing the proposed action". Incidentally, this memorandum (Curran-Wall brief, p. 12) was not offered at the trial either but was an enclosure delivered with Mr. Epstein's letter of July 20, 1972, after the trial had been concluded (55-56a). The alleged meeting which purported to approve the February payment was held four months after the deposit was made. By this schedule the approval (if an approval it was) was clearly exculpatory of liability

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* Our petition, p. 19, incorrectly states the date of the Epstein letter as July 20, 1973. It was dated July 20, 1972.

for a wrongful payment and for that reason void under § 501. In fact, the meeting itself was not authorized by the NMU Constitution, Article 4, Section 2(a) (145a). The notice of the meeting was not published in the NMU Pilot as required by that section. Moreover, the notice was misleading and lacked candor. It failed to disclose that the new plan would give the National Office (Curran) power to select participants and fix the amount of their respective benefits. The notice indicated that limits had been placed upon Curran's power to select, designate and apportion (Curran-Wall brief, p. 12), whereas no such limits were written in the Plan. The notice failed to tell the members that the proposed plan had already cost NMU over $460,000. On the contrary, the notice concluded with this statement:

> "It is to be emphasized that the adoption of any or all of the foregoing changes to the NMU Officers' Pension Plan will be subject to the condition that they do not involve any increase in cost to the Union."

Reply to the Defendant Segal

I

The question of who is and who is not an "officer" of a National or International Union does merit review by this Court.

Mr. Segal argues (Segal brief, p. 10) that upon remand "the District Court was faced with the task of determining what amounts had been contributed by the NMU to the plan on behalf of 'non-officers' ". That task should have been simple if reference had been made to the plan itself, which limited the participation to "elected officials"; to the decision of the Lumbard-Anderson panel in this case; and to the stipulation that contributions to the plan for non-elected persons were $1,628,921.

The provisions of the NMU Constitution which purported to permit appointments in lieu of elections (Segal brief, p. 10) had already been declared void in *Wirtz* v.

National Maritime Union of America, 399 F.2d 544 (2nd Cir., 1968), as violative of the LMRDA. There was no evidence that any payment had been made to the Officers' Plan for persons appointed to fill a vacancy for an unexpired term (Segal brief, p. 10).

Mr. Segal's argument (Segal brief, p. 11 *et seq.*) deals with what might have been rather than what was. But we are dealing with what was. The Officers' Plan was created by NMU for the "exclusive benefit of its elected officials" (SA51). The LMRDA provides that you cannot be an officer of a national or international union unless duly elected (Title 29 USC § 481(a); SA40). *Wirtz* v. *NMU,* 399 F.2d 544 (1968), held that "patrolmen", "field patrolmen" and "agents" must be elected. The Hays decision is not only at odds with the prior panel in this case but also is squarely at odds with the *Wirtz* holding.

II

The second circuit's decision not to sit *en banc* left unresolved an intracircuit conflict.

The second circuit had the power to sit *en banc* when this Court granted a writ of certiorari and reversed in *Maggio* v. *Zeitz,* 333 U.S. 56 (1948) (per *contra* Segal brief, p. 13). As a matter of practice, however, the second circuit had never sat *en banc* (333 U.S. 82, footnote 5) but always deferred to the prior panel. Judge Oakes in his dissent in *Eisen* v. *Carlisle,* 479 F.2d 1005 (1973), 1025 observed:

> "The Learned Hand court was apparently able never to sit en banc."

But what happened here is surely a novel situation. This is not the usual situation of a second panel deferring to an earlier one when it should not do so (*Maggio*). Here the second panel did not defer to an earlier panel when it should have.

III

The question really presented *(per contra,* Segal brief, Point II) is: may a LMRDA fiduciary intentionally allow the statute of limitations to expire against a union fund in favor of a person to whom he has made an unlawful payment without incurring personal liability therefor?

Mr. Segal erroneously says that this issue "was not seriously pursued in the courts below" (Segal brief, p. 13). This subject is more fully answered below.

Reply to the Defendant Karchmer

As to the trustees' personal liability for deliberately allowing the statute of limitations to expire against their trust with respect to the Brauch payment:

I

Mr. Karchmer is in error when he says, "Plaintiffs first surfaced the present issue before the Court of Appeals" (Karchmer brief, p. 2). The matter was gone into at the trial (660-661a; our petition, p. 16).

Mr. Karchmer (Karchmer brief, p. 4) is also in error when he states that it "was not until January 11, 1972 that the amendment was first judicially declared invalid and that subsequent payments thereunder by the trustees to non-elected officers were enjoined." The amendment was first judicially declared invalid on May 23, 1969. That decision should have placed the trustees on notice. But even if Mr. Karchmer were correct about the date, he, and his fellow trustees Freedman and Segal, still had over three months after January 11, 1972 to institute suit against Brauch and to prevent the statute from running against their trust.

II

When this action was instituted plaintiffs did not know what unlawful payments, if any, had been made by the trustees or to whom such payments had been made, or when such payments had been made. Accordingly, they could not have made the allegations in their complaint required by Subdivision (c) of Rule 19 of the Federal Rules of Civil Procedure (Karchmer brief, p. 8). They only knew that such payment to Perry had either been made or was imminent. Perry was joined as a defendant.

The trustees, on the other hand, had all this information readily at their disposal and could have joined those persons to whom they had made unlawful payments, or they could have instituted separate suits against such individuals. They did neither.

Rule 20 of the Federal Rules of Civil Procedure is the rule applicable here (permissive joinder) and not Rule 19.

Conclusion

It is again suggested that this Court may summarily reverse on the issues presented in the plaintiffs' cross-petition.

Respectfully submitted,

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